No. 2795.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALASKA JUNEAU GOLD MINING COMPANY,
Appellant,

vs.

EBNER GOLD MINING COMPANY, et al.,
Appellees.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

This is an action brought by the Alaska Juneau Gold Mining Company, appellant here and plaintiff in the court below, against the Ebner Gold Mining Company and others, appellees and defendants below, to enjoin them from interfering with appellant's asserted rights to the use of a certain portion of the waters of Gold Creek near Juneau, Alaska, and from diverting such waters to the detriment and injury of appellant. In effect the purpose of the action is to determine as between appellant and the appellee, Ebner Gold Mining Company, appellant's right to the uninterrupted enjoyment and use of such portion

of the waters of that stream as it is asserted appellant had theretofore appropriated, diverted and used. The appellees other than the Ebner Company are nominal parties. The real controversy is between the Alaska Juneau and the Ebner Companies, both parties having at the time the action was commenced diverted the water of the Creek, the diversion by the Ebner Company depriving the Alaska Juneau of the full enjoyment of its rights as asserted in the action. The crucial question in the case is that of priority of right.

The trial Court awarded judgment in favor of the appellee, from which judgment this appeal is prosecuted.

In the discussion which follows, the appellant will be referred to as the Alaska Juneau Company, and the appellee as the Ebner Company.

STATEMENT OF THE CASE.

Gold Creek is a natural stream of water having its source in the mountains situate above Silver Bow Basin, a few miles easterly from the town of Juneau, Alaska, from whence it flows through a series of basins and canyons in a westerly direction into Gastineau Channel, an arm of the Pacific Ocean, collecting the waters of small streams and tributaries along its course.

The section of the country traversed by the stream, and in which the diversion works of the respective parties have been constructed, is rocky, precipitous,

and covered with brush. The character of the topography may be observed from the photographs introduced in evidence, among which are plaintiff's Exhibits 11 to 15, appearing on pages 1947 to 1951, Volume V of the Record. During the spring and summer months, and for an average period probably of six months in the year, there is a large volume of water sufficient to supply the requirements of both parties. The volume decreases with the cold weather, and the flow becomes comparatively small and insufficient.

The rights asserted by the Alaska Juneau to the waters of this creek had their origin on August 1, 1910. It claims that all the acts and things done by it in connection with the diversion and use of the water relate back to that date. The acts and things done, through which the doctrine of relation is invoked by the Alaska Juneau, will be narrated hereafter. The purpose of naming the date at this juncture is to inform the Court as to the status of the waters of the stream with regard to appropriation and user at the time the rights of the Alaska Juneau attached, and to familiarize the Court with the physical features as they existed at that date.

This status and the physical features may be explained by reference to Plaintiff's Exhibit 1, appearing in Volume V of the Record, at page 1934, bearing the legend, "Map Showing Alaska Juneau and Ebner Properties." (The reproduction of this map in the

record is faint and unsatisfactory, and resort should be had to the original, which is on file with the Clerk.) At a point on Gold Creek marked "Ebner Dam," in the upper left hand corner of the map, the Ebner Company many years prior to Aug. 1, 1910, diverted the water by means of a dam and flume, the intake of the flume being on the South or left bank of the creek going down stream, and the flume being constructed on the same side of, and at an elevation above, the creek. From the Ebner Dam the water was conducted by the Ebner Company by means of this flume to a point above the Old Ebner Mill, where it was conducted into a penstock, and through this means power was obtained to operate the old mill, equipped at first with 10, and afterwards with 15 stamps.

Subsequently a new mill was planned by the Ebner, and the building constructed lower down stream at the point marked on Plaintiff's Exhibit 1 "New Ebner Mill and excavation for enlargement." This mill building is shown on the photograph, Plaintiff's Exhibit 27, appearing in Volume V of the Record, at page 1971. The stamps were never placed in the mill building, but the Ebner Company installed therein an air compressor. Water was conducted to this by flume and pipe line, and compressed air manufactured for operating drills and other purposes.

All the water thus diverted and used by the Ebner Company was returned to the creek, and resumed

its natural course to the sea, practically undiminished as to quantity. While for some years the property was not operated, and the water was not used, the right of the Ebner Company to the water so diverted and used is not here challenged. The diversion of the Alaska Juneau here involved is at a point below where the water was returned to its natural channel and where so far as any physical evidences on the ground were concerned, the water was on August 1, 1910, subject to appropriation by the next comer. The point of diversion of the Alaska Juneau is at the place marked on Plaintiff's Exhibit 1, "Alaska Juneau Dam."

Some time after August 1, 1910, after the Alaska Juneau had commenced its work preparatory to diversion and during hostilities and litigation which followed, the Alaska Juneau was for the first time informed that on June 20, 1910, one H. T. Tripp, had posted a notice of appropriation of water at the site of the original Ebner Dam, and on the same side of the creek as the intake of the Old Ebner Flume, and that the Ebner Company claimed some rights under this notice. This notice was, as testified to by Tripp himself, torn down in July, 1910 (Record, Vol. 2, p. 584). It was not recorded until October 25, 1910, prior to which time the Alaska Juneau had actually diverted the water through its intake at the Alaska Juneau Dam. As we will hereafter endeavor to point out, Tripp was not at any time in privity with the

Ebner Company, and that company did not succeed to his rights, whatever they may have been, until May 21, 1914.

As this is the notice upon which the Ebner Company relies, and upon which the Court below based its decision, as giving to the Ebner Company priority over the Alaska Juneau, and under which that company justifies its subsequent diversion at the same Old Ebner Dam, taking the water out on the North or opposite side of the creek, conducting it down the opposite bank, and returning it to the creek at "Shady Bend," or on the Cape Horn No. 2 Lode Claim below the Alaska Juneau Dam, it will be a subject of serious discussion later on. Our present purpose is mainly one of narration of events in as near a chronological order as the subject permits.

This was the condition of affairs on August 1, 1910. It is necessary to briefly state the sequence of events occurring on and subsequent to that date. The facts narrated are without substantial conflict, unless otherwise noted.

ACTIVITIES OF ALASKA JUNEAU.

For the purpose of this narration, we epitomize briefly the testimony of Kinzie, the General Superintendent of the Alaska Juneau, who was in the immediate charge of the activities of that company. He is substantially corroborated as to all material facts.

His testimony on this branch of the case appears in Volume I of the Record, pages 182 *et seq.*

Early in July, 1910, a preliminary line was surveyed by the Alaska Juneau from a point on Gold Creek to a point on Gastineau Channel, where it was contemplated that a mill (since partially completed) was to be built, and the waters of Gold Creek were to be conducted in accordance with early plans of the company previously testified to by Kinzie (Record, p. 181). This flume line was laid out under the immediate direction of Jones, Superintendent acting under Kinzie, and a number of mining locations along the line of the flume between Gastineau Channel and the proposed intake of the flume were made on July 11, 1910 (Record, Vol. II, pp. 488, *et seq.*), which locations would prove serviceable for right of way, in addition to other purposes.

On August 1, 1910, Kinzie, the General Superintendent of the Alaska Juneau, sent L. D. Mulligan to locate the water of Gold Creek (Rec., p. 182), and on the same day Mulligan posted a notice claiming 20,000 inches of the flow of the creek (Rec., p. 442). The notice was introduced in evidence as Plaintiff's Exhibit No. 24 (Rec., p. 1959, Vol. V). It was claimed by the Ebner Company that the place of posting was on the patented Lotta claim of that company, and while there is a great deal of uncertainty as to where the true boundary lines of the Lotta were, owing to conflicts between the field notes of the patent

survey, tie calls and patent plats with what were claimed to be the stakes and monuments on the ground, the District Court of Alaska in other litigation between the same parties, to be hereafter noted, determined in effect that the notice was so posted on the Lotta claim, a short distance above the Alaska Juneau Dam, and for the purpose of this case it will be so assumed. The legal value of this notice as a muniment of title, and the effect of its posting on Ebner ground, will be noted when discussing the legal problems involved. This notice was recorded on August 8, 1910. Mulligan conveyed his rights thus originating to the Alaska Juneau on August 2, 1910 (Rec., p. 1961, Vol. V). On the same day this notice was posted (August 1), Kenzie sent O. M. Harri to Gold Creek to make preliminary arrangements to accommodate a crew of men who were to work on the construction of flumes, tunnel, etc., brush out trails, etc. Lumber was provided for the building of a bunk house for the men. By August 3rd, five men were at work (including two Indians) brushing out trails (Rec., p. 395). On August 5th, trails had been constructed on both sides of the creek, steps had been cut in the rock at Snow Slide Gulch; four or five men were at work, and carpenters were building the bunk house. From August 1, commencing with one man, the force was increased as rapidly as they could be properly employed until in November it numbered fifty or sixty men. Preliminary work, such as trails,

etc., had been advanced by the latter part of August, so as to permit of construction of the grade for the flume. A water tunnel was started at Snow Slide Gulch to carry the water under the surface and protect the flume from snow slides. Early in September actual grade construction was started (Rec., p. 193). In the latter part of September work on the dam was started. This work was interfered with by men rolling rocks down from above on the opposite bank and blasting rocks, driving the men out of the creek where they were working (Rec., p. 195).

On October 3, 1910, the Alaska Juneau dam was completed, flume started, and water turned in. In the construction of this dam it was intended to be located on land south of the patented south side line of the Lotta claim owned by the Ebner and upon unpatented land claimed by both parties, and subsequently, as hereafter noted, adjudicated to be on government land. The timbers were laid diagonally across the creek, so that the upper end of such timbers rested for a short distance on the patented Lotta claim of the Ebner. The headgate and intake of the flume, however, were on government land.

On the night of October 3, the flume was crushed by blasting and rolling down rocks, and blasting was continued on October 4th (see Plaintiff's Exhibit 9, Rec., p. 1941). These acts were done by men acting under instructions of a man by the name of Bent, who claimed to represent one F. L. Underwood, or the

California Nevada Copper Company, through whom the Ebner now claims to have succeeded to whatever rights were acquired through the Tripp water notice and the subsequent acts of Bent and his employees.

A temporary flume was built by the Alaska Juneau around the point at Snow Slide Gulch to conduct the water until the water tunnel was completed. An air compressor was installed at Snow Slide Gulch, for the purpose of manufacturing compressed air for use in driving tunnels, and was first started on November 17, 1910. The flume line was ultimately completed and water conducted to the millsite of the Alaska Juneau on the Gastineau Channel, at the place shown on Plaintiff's Exhibit 1, where it was first used to sluice off the banks for mill foundation. After the mill was constructed, water was used for battery and other purposes and sluicing tailings into the channel. The cost of this water diversion was in the neighborhood of $90,000. The mill then in contemplation was to have a capacity of 12,000 tons per day (Rec., p. 211). This mill is now in course of construction.

On September 14, 1910, a notice of appropriation, amending the Mulligan notice, was posted by the Alaska Juneau, but was not recorded (Rec., p. 208).

On May 8, 1911, the Alaska Juneau posted what may be here termed a supplementary or amended notice referring to the Mulligan notice, and posted the same at the place where the Alaska Juneau Dam had been constructed, and recorded such notice on

the same day (Plaintiff's Exhibit No. 10, Rec. Vol. V, p. 1943). The legal value of these notices will be discussed when we reach the law problems involved.

From the time that Harri was first sent by the Alaska Juneau on to the ground, on August 1, 1910, the work was continuously and vigorously prosecuted, with as many men at a time as could be employed, until the water was finally conducted to the Alaska Juneau millsite on the Gastineau Channel.

The flume line of the Alaska Juneau on the South side of the creek (left hand going down stream) is shown on Plaintiff's Exhibit 1. The new flume of the Ebner Company which takes the water out of the creek at the Old Ebner Dam and above the Alaska Juneau Dam, is also shown on the exhibit on the north side of the creek. By means of this new Ebner flume the water is returned to the creek, at Shady Bend or on the Cape Horn No. 2 Lode Claim, below the dam of the Alaska Juneau, thus depriving the Alaska Juneau of water at the times when there is not sufficient to supply the requirements of both parties.

ACTIVITIES CLAIMED IN BEHALF OF THE EBNER COMPANY.

As heretofore noted, the Ebner Company asserts that its rights date from a notice of appropriation made by H. T. Tripp June 20, 1910. At the time this notice was posted and thenceforward until Au-

gust 3, 1910, at which date he was discharged, Tripp was an employee of F. L. Underwood or the California Nevada Copper Company, and was not an employee of the Ebner Company. We expect to point out later that whatever Tripp did and whatever motive prompted him to post that notice, it was not done at the instigation or for the benefit of the Ebner Company, but was a part, and that a purely speculative part, of his activities in behalf of Underwood or the California Nevada Copper Company.

Tripp was succeeded on August 3, 1910, by a man by the name of George Bent, who likewise had nothing to do with the Ebner Company.

Testimony of Judge Winn, Rec., Vol. IV, p. 1231.

The subsequent activities, narration of which follows, were carried on under the Bent regime.

Bent arrived in Juneau the latter part of July, 1910. On August 3, accompanied by Mackay, whom we may call Bent's superintendent, and Wettrick and Hill, his surveyors, he went to Gold Creek. On that day, by the use of a transit set on the south bank of the creek on the line of the Old Ebner flume (south or lefthand side going down), the surveyors projected a level on the hill on the opposite side of the creek (Rec., p. 605). Discussion was had between Bent, Mackay, Wettrick and Hill as to the proper place for a mill site. On the 4th of August they

surveyed a preliminary line, and began using it on August 6 (609). The data obtained prior to that time was in a general way to find out where the projected line of operations would lead them, and what kind of a country they would go over (610). On August 6th a decision as to the place where the mill was to be erected was arrived at (721) and they started to run out a flume grade (611). The locality selected for the mill is commonly called "Shady Bend" and on a certain mining claim known as Cape Horn Lode No. 2 claim, and is shown on Plaintiff's Exhibit 1 on the lower lefthand side of the map, and on Defendant's Exhibit S, Record, page 2168, a copy of which is also attached to the decree herein (Rec., p. 2681, Vol. VII).

On August 17th, the Ebner Company, by John R. Winn, its agent, posted at the Old Ebner Dam, and on the same day recorded a notice, which appears in the Record at page 2218. The notice stated that the Ebner Gold Mining Company is the owner and claims under this notice all the waters of the creek to its entire flow during all seasons and at all time or times that said corporation is not already entitled to by reason of prior right or appropriation. The legal value of this notice will be discussed when we reach the argument of the law problems involved.

On August 25, 1910, the Ebner Company commenced suit against the Alaska Juneau, wherein it sought to obtain an injunction inhibiting the Alaska

Juneau from diverting the water, alleging that the acts constituting a continuous trespass looking to such diversion, had occurred continuously from July 27, 1910, to the date of the commencement of the action (Rec., p. 1963). The injunction was denied September 2, 1910 (Rec., p. 2039). The work of excavating for the new Ebner flume was started in September, 1910. On October 3rd, grade for the new Ebner flume had been completed to the extent of approximately 1000 to 1200 feet (635). The headgate was installed at the Old Ebner Dam (north side of the creek) between the 4th and 5th of October, and one or two lengths of flume put in (637), for the purpose of taking out the water from the north side of the Old Ebner Dam opposite the intake of the old Ebner flume. The new flume was finished in December, 1910 (701).

Excavation was made for a mill, and some mill lumber claimed to be a part of the material manufactured in Seattle in July, 1910, for a 200-stamp mill (Rec., p. 695) was brought to Juneau; also some machinery and an air compressor had been shipped (Rec., pp. 707-708), the latter having, however, been stored in Juneau (Rec., p. 527), none of which, however, were utilized until several years later. No use whatever was made of the new flume until August, 1913. In December, 1910, after the completion of the flume, Mackay started a tunnel in the vicinity of the "Shady Bend" on the Cape Horn No. 2 Lode

Claim, near the millsite, which had been selected August 6th. This tunnel was subsequently driven so as to cross-cut the ore bodies in the Ebner mines lying to the north of the Old Ebner Dam. The position of this tunnel is shown on Defendant's Exhibit S, Record, page 2167, copy of which is attached to the decree (Rec., Vol. VII, p. 2681). From the date of the completion of the new Ebner flume in December, 1910, until August, 1913, the old compressor situated in the new Ebner mill building above the Alaska Juneau dam, was used for power for operating drills used in constructing this new Ebner tunnel, and during all this period the water was turned back into the creek above the Alaska Juneau dam, and the use of such water by the Alaska Juneau through its flume was not interfered with. Work on this tunnel was suspended in October, 1911, at which time it had been extended for a length of 1180 feet (Rec., p. 702).

In the latter part of 1913, the installation of a new air compressor was started by the Ebner Company at "Shady Bend" on the Cape Horn No. 2 Lode Claim (705), and on or about December 17, 1913, for the first time, water from the new Ebner flume was put to a beneficial use, i. e., to operate the new compressor for driving drills in continuing the new Ebner tunnel. This diversion from the Old Ebner Dam in December, 1913, into the new Ebner flume, deprived the Alaska Juneau of the use of the water.

This action was commenced January 7th, 1914. After the suit was commenced a 5-stamp sampling mill was installed at the Shady Bend millsite by parties representing Underwood or the California Nevada Copper Company (Rec., p. 706), and power to drive it was also obtained from water coming through the new Ebner flume. No part of the contemplated 200-stamp mill was ever erected.

The foregoing is, we think, a fair statement of the facts developed at the trial and shown by the record.

There were two other matters which became involved during the trial, which may be here noted preliminary to the discussion of the errors assigned.

Both parties introduced evidence showing, or tending to show, intention on the part of the companies themselves, or those through whom they claim, to establish millsites at points which would require the utilization of the waters of Gold Creek below the point where the waters were turned back into the creek after having been used at the old Ebner mill and compressor above the present site of the Alaska Juneau dam. We apprehend that this intention is of no serious import, unless it was either disclosed by one party to the other, or there was some overt act exhibiting the intention. This feature of the case will be alluded to when discussing the legal problems.

There was also a great deal of testimony tending to show on the part of the Alaska Juneau that there

had been adopted at miners' meetings a code of rules governing the appropriation of water in the Harris Mining District, which rules were in force at the time the various locations were made, which were not followed by Tripp in making his location in June, 1910, and that therefore no title could be predicated on the Tripp notice. On the part of the Ebner Company it was contended that these rules, if they had ever been adopted, had fallen into disuse, and possessed no vitality, and the legal value of the notices was in no way dependent upon obedience to those rules.

As the Court found this issue in favor of the Ebner Company, it will be expedient for us to deal with this question later.

THE DECISION OF THE TRIAL COURT.

The Findings as adopted by the Court are ten in number, an epitome of which may be here stated:

I. The corporate capacity of the Ebner Company.

II. The ownership by the Ebner Company of certain mines and mining claims containing gold. Gold Creek flows through these claims and winds its way down to the Ebner Millsites. Gold Creek is a mountain stream with considerable falls and rapids, and at certain seasons carries a large flow of water, and at other seasons the flow is less by reason of the cold

weather. That for many years prior to the commencement of this action the Ebner Company had mined and milled ores taken from the mines at the upper group and operated a stamp mill located on Gold Creek at the upper end of its mines, and also operated an air compressor and machinery necessary for the operation of the mill and compressor. For these purposes water was diverted from Gold Creek and used. This diversion of the water was made at the upper end of said mines, and after using was turned back into the stream.

Note: There is no exception to these findings. They relate to the diversion, use and return of the water to the stream above the Alaska Juneau dam.

III. Sometime in 1908 the Ebner Company and its President and General Manager, Wm. M. Ebner, concluded to open up the properties and mine and mill the ores on a larger scale. For that purpose it was concluded to drive a large working tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim. They also concluded upon building and equipping a 150 or 200 stamp mill, and for this purpose to take the water out of Gold Creek and deliver it to the proposed 200 stamp mill. That during the year of 1909

one H. T. Tripp, who was employed "by persons interested in said group of mines" to look over, examine and explore said mining property on a larger scale, as had been decided by the Ebner Company and Ebner, its President. He finished his examination and made his report the last of June or 1st of July, 1910.

IV. That in 1880 miners in and near the vicinity of Juneau diverted water from the streams and from that date until the present time it has been the universal custom for any person or corporation desiring to appropriate water to post a notice in a conspicuous place at the intended point of diversion; that the posting of such notice has always been considered under such general custom of miners as the first step looking towards the appropriation and applying the water, and as showing the intention of the person or corporation posting the notice, and giving warning and notice to others of the poster's intention. That H. T. Tripp knew of this custom, and on June 20, 1910, he posted the notice of location referred to in our statement of the case; that said notice was posted in a conspicuous place; that Tripp in signing and making said notice and posting it, was acting on behalf of and for said Ebner group of mines, and parties interested therein, and said water was intended to be conducted

down to Cape Horn No. 2 Lode Claim, as had been contemplated, under the Ebner and Tripp scheme of operating said property on a larger scale.

V. That the action of Tripp in posting said notice was the first step taken by anyone looking towards the future diversion of water of Gold Creek. The said action of Tripp was prior to any step taken by plaintiff, or intention made manifest by plaintiff to take any water from Gold Creek and apply it to its beneficial use, and was prior to the posting of any other location notice by said plaintiff; that not until after defendant had followed up its first step, namely, posting of notice of actual physical work at the point where this notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek.

VII. That by mesne conveyances, Tripp long before the commencement of the action, assigned all his rights to the Ebner Company. That work was commenced under said Tripp notice, and

those for whom the said water was located, and their successors in interest, proceeded with due diligence with their work in opening up and developing said mining property. The facts heretofore recited in our statement of the case, with some variation, but unimportant, are recited in this finding, and the conclusion stated that work has progressed on the property with due diligence, and from time to time large quantities of water were taken from Gold Creek through the new Ebner flume.

VIII. That at the time the Alaska Juneau claims that defendants were wrongfully depriving plaintiff of the use of the water of Gold Creek, defendants were using the same, and it was necessary at all times for the Ebner Company to have the use of the water.

IX. That the tunnel being driven by the Ebner Company is being driven through the group of Ebner lode mining claims, and for the benefit of such said water was located by said Tripp, and all the work of opening up the ore bodies on said claims has been done with diligence, $351,000, more or less, having been expended in opening up such ore bodies.

X. With reference to the rules and regulations which the Alaska Juneau sets out in its reply and claims were adopted by the miners of

Harris Mining District in 1882, the Court finds after careful consideration that they were never followed by the miners, and were never put in force, or if they were ever followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and were inconsistent with the general laws of the United States, and could not be in force since the institution of organized government in Alaska in the year 1884, and are therefore of no effect in the determination of the issues of this case.

XI. The Court further finds that the work of diversion, appropriation and application of the water of Gold Creek by the Ebner was prosecuted to completion with reasonable diligence from the time of the inception of the right.

As conclusions of law the Court finds:

1. That the Ebner is entitled to the first use of ten thousand miner's inches of water to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted.
2. That whatever right the Alaska Juneau has in the water of Gold Creek is subordinate to the right of the Ebner.
3. That plaintiff is not entitled to the relief asked for, or to any relief.

All of the findings other than the first two, and all the conclusions of law, are duly excepted to, and the grounds of such exception are fully stated in the record. The foregoing findings and conclusions of law will be discussed in due course.

According to the contention of the Alaska Juneau, the most vital of all the errors committed by the Court is that wherein it determined the question of priority in favor of the Ebner Company, based upon the Tripp notice of June, 1910, and the acts succeeding it. From the opinion of the Court on the application for an injunction (Rec., Vol. I, p. 150), and on the memorandum decision ordering judgment for the Ebner Company dismissing the bill (Rec., Vol. I, p. 159), it is apparent that the trial Court rested its decisions entirely on that notice. That the error is fundamental, we hope to point out in discussing the assignments of error.

ASSIGNMENTS OF ERROR.

Appellant has assigned seventy-four errors as having been committed by the trial Court. They appear in the Record in Volume VII, commencing at page 2686. It will serve no useful purpose to here enumerate any except such as are specially relied upon.

In making up its bill of exceptions and assignment of errors and presenting this appeal to this Court, counsel for appellant were and are guided by the Act of the Legislature of the Territory of Alaska,

approved April 28, 1915, amending Section 1204 of the Compiled Laws of Alaska, relative to findings of fact by the Court in actions of an equitable nature. This section as amended is as follows:

> "Section 1204. All issues of fact in actions of an equitable nature may be tried by the Court, and if tried by the Court, the evidence shall be presented and the trial conducted in the same manner as other actions; Provided, the Court may, in its discretion, refer the case to a referee pursuant to the provisions of this title. In all such actions the Court, in rendering its decisions therein shall set out in writing its findings of fact upon all material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk, and shall be incorporated in, and constitute a part of, the judgment roll of the case; and such findings of fact shall be subject to review by the appellate tribunal, and may be amended to conform to the evidence. Exceptions may be taken during the trial to the ruling of the Court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days from the entering of the decree, or such further time as the Court may allow."

Session Laws of Alaska, 1915, p. 80.

We may eliminate from consideration assignments 1 to 39 inclusive. All matters pertinent to the discussion, and on which appellant relies, may be fully

considered in connection with the remaining assignments.

The errors relied upon attack the Findings and Conclusions of Law. The attacked findings are long, argumentative, full of probative facts, intermixed with conclusions of law, partially expressed inferences, and *non sequiturs,* and it is somewhat difficult to deal with them as units. Inferences stated in one finding lap over into another. It will be seen as we approach the discussion that in most of the instances appellant's principal attack on these findings is directed to the conclusions of law, inferences and *non sequiturs,* so interwoven with the recited facts as to render it difficult to separate them. The probative facts as distinguished from the ultimate ones are not so much a matter of objection as the inferences and conclusions stated in the finding itself and forming a part of it. The manner in which we propose to deal with the situation will be outlined later.

Complying with what we understand to be the rules of this Court as to specifying assignments on which we rely, we herewith enumerate the errors upon which such reliance will be placed. We shall present for the consideration of the Court the matters embraced within the following assignments:

Nos. 40, 41, 42, 43, attack Finding III.

The exceptions taken to this finding appear on pages 2645-2647, Vol. VII, of the Record.

Nos. 44, 45, 46, 47, 48, 49, 50 attack Finding IV.
The exceptions taken to this finding appear on pages 2649-2654, Vol. VII, of the Record.

Nos. 51, 52, 53 attack Finding V.
The exceptions taken to this finding appear on pages 2655-2659, Vol. VII, of the Record.

Nos. 54, 55, 56, 57, 58, 59, 60, 61 and 62 attack Finding VII.
The exceptions taken to this finding appear on pages 2662-2667.

Nos. 63, 64, 65 attack Finding IX.
The exceptions taken to this finding appear on pages 2668-2670.

Nos. 66, 67, 68, 69 attack Finding X.
The exceptions taken to this finding appear on pages 2671-2673, Vol. VII, of the Record.

No. 70 attacks Finding XI.
The exceptions taken to this finding appear on pages 2673-2674, Vol. VII, of the Record.

Nos. 71, 72 and 73 attack the Conclusions of Law.
The exceptions to these conclusions are found on pages 2674-2676, Vol. VII, of the Record.

ORDER OF ARGUMENT.

In order that the Court may be clearly informed as to the contention of appellant in connection with the assignments of error, it is essential to consider and point out certain basic matters in the light of which the entire findings are to be examined in connection with the exceptions. If we may satisfactorily dispose of these fundamentals, the case itself predicated upon them will likewise be effectually disposed of.

We propose therefore on the threshold to take up for analysis, consideration and discussion the connection of H. T. Tripp with the Ebner Company, the circumstances under which the water notice was posted by him, the purposes for which it was done, and all the facts connected with it, and the asserted accession by the Ebner Company to whatever rights he acquired under it.

We shall also consider the antecedent "intention" of the Ebner Company in previous years, and the relationship of such intentions to the Tripp notice.

We shall also take up for discussion the laws governing the acquisition of water rights in Alaska, and the legal value of the Tripp appropriation. After this survey we may take up the assignments of error.

THE WATER APPROPRIATION BY H. T. TRIPP AND HIS RELATION TO THE EBNER COMPANY.

In the opinion of the Court, denying an application of the Alaska Juneau for an injunction, the Court said:

> "I find that the Tripp notice was the first step taken by any one."

Record, Vol. I, p. 158.

In its memorandum decision directing a dismissal of the bill, the Court said:

> "I think that the Tripp notice was the first step taken by anyone and that those who took that step and their successors have proceeded with due diligence and that they are prior in point of time to the plaintiff."

Record, Vol. I, p. 159.

This leads us to inquire who Tripp was and what he did. His testimony is in the record, having been called as a witness for the Ebner Company. It is found in Volume II of the Record, pages 507 to 573. We may briefly epitomize his testimony on this branch of the case (italics are ours):

> In 1908 was employed by F. L. Underwood, President of the California Nevada Copper Company, to look over the whole field between the Alaska Juneau ground and the Dora Group and all the mines along the belt, including Mt. Juneau. The purpose was to determine where the ore

bodies were and ascertain their value and in a general way to size the properties up for a mine. The work continued through 1909 and part of 1910 (p. 510), sampling all the ore bodies that were not pretty well developed, surveyed the ground and made an assay map; had contour lines all around Gold Creek side holes and connected them up with various mineral posts, patented claims and so forth, and gathered data for a large map to cover the whole property (p. 511). The proposition was that he (Underwood) calculated to make a mine there and was preparing the way to work it in a systematic and businesslike manner, and to find the best way to work it. Most of the work was done in 1909. Until the time Bent and his party arrived, which was in the latter part of July, everything was in my possession, practically under my directions, until I received notice from Mr. Bent and papers that practically amounted to the fact that I was no longer in their employ. My remembrance is that I turned over the property on August 3, 1910 (p. 512). I made continuous reports to the parties who employed me. My idea was to open up the property on a different plan and working it on a larger scale than it had been worked theretofore, to find out the best location, most suitable place, to open the mines in a businesslike way, and I examined every place along the line of the creek, had measurements made and mapped, and finally determined on the place at Shady Bend near where the tunnel is now located and run. The place selected by me would be nearer where the 5-stamp mill is (p. 513). I made recommendations to my employers. I kept constant correspondence with Mr. Underwood. I don't remember that I stated anything to Mr. Bent or Mackay at that time who were here. *They chose other locations*

after I got out of the employ of the company. I calculated to run a tunnel from that point that would have the outlet of tunnel located in the proper place for a mill, according to my way of thinking the best place, and the tunnel would have been driven to intercept the Ebner lead in the best place for the general opening up of the Ebner lead (p. 514). . . . I wrote and posted a notice claiming the water right on Gold Creek. (Notice is in evidence, marked Defendant's Exhibit C, Vol. VII, Record, p. 2164, and will be hereafter set forth.) I posted it at the dam where the flume of the Ebner Company took water from Gold Creek (p. 519). The notice was posted on the opposite side of the dam from the intake of the *new* flume (i. e., on the same side as the intake of the *old* flume). The notice was posted on a timber that was part of the gate or bulkhead at the dam (p. 521). *I did not record the notice.* (Note. It was not recorded until October 25, 1910. Record, Vol. VI, p. 2086.) In locating the tunnel (above referred to) it was the best place that you could get an outlet to the mine that would give sufficient depth to really warrant us in running a tunnel (p. 521); it would give the greatest power for the water and it would be in a place where the climatic conditions, etc., were more favorable, giving a 400-foot head for water. Received a cablegram from Underwood, telling me to commence work immediately on the construction of the flume carrying the water out of Gold Creek, and at that time I went up there, or a day or two afterwards, and located this water, with the expectation to commence work and build a flume and convey the water down along the plans and lines I had in view (p. 522).

Note: The cablegram was later offered in evidence, in connection with his cross-examination.

It was dated June 17, 1910, and read, "You can arrange for putting dam and flume in order immediately. Money required will be supplied Tuesday." The witness then admitted that this referred to the *old* dam and the *old* flume (Rec., p. 555).

The repair work had been done before he received the telegram (p. 523). The witness further explained that he intended to build a new flume on a little different grade on the *south* side of the creek where the old flume was, utilizing the water at the *old* compressor (above the present site of the Alaska Juneau dam), and run a line for a pipe around Cape Horn on the same side of the creek (p. 523). The witness saw that the notice remained posted during the time the Bent party was on the ground (latter part of July or 1st of August, 1910). The notice was conspicuously posted (p. 525), and could be seen from certain parts of the road.

On cross-examination the witness testified in substance as follows:

I was employed by F. L. Underwood. I don't know anything more about the California Copper Company than he was supposed to be the President. I don't even know that. I was working for Mr. Underwood, who, from communications, so far as I ever knew, had an option on the Ebner property, or some kind of an arrangement by which he had that property (p. 535). I was not working for the Ebner Company (p. 537); had nothing to do with them. There was no agreement of employment unless it was with Mr. Underwood and his connection with the Ebner Company (p. 538). On August 3, I had a paper

served on me from Winn & Barton's office to get off the ground and deliver the keys and possession. I sued the California and Nevada Company for my money and it was paid (p. 540).

The witness further testified that he had in mind three millsites which might be available for a large mill—one above the present site of the Alaska Juneau dam on the Lotta claim of the Ebner, the other two below. He had reported on all three of these (p. 552). From the time he went on the property in 1908, until he quit the employ of the California Nevada Copper Company, there was not anything done on the property in the shape of milling ore or active work—no mining operations (p. 555).

Up to the 3rd of August, 1910, the day he left, *no work* had been done under the water notice posted by Tripp in June (p. 562). The notice had been torn down about the last of July (p. 580). The copy was in Tripp's possession until October, 1910, when it was delivered to Judge Winn (p. 580).

There is absolutely nothing in the record showing any relationship, contractual or otherwise, between Underwood or the California Nevada Copper Company and the Ebner Company. There is at best some slight suggestion in the nature of common gossip that either Underwood or the California Nevada Copper Company had an option on the Ebner property, but there is no proof of anything of the kind.

The following deductions are inevitable from Tripp's testimony, which is not contradicted:

1. Underwood employed Tripp to "spy out the land," investigate the properties, and make plans

so that if Underwood might subsequently acquire any rights in the property he might, if he saw fit, adopt the plans. If not, they would possess no vitality.

2. Whatever intentions Tripp may have had, they were entirely personal, speculative, problematical, and dependent on contingencies. They certainly never became adopted or claimed by any overt act until after August 1, 1910, when the Alaska Juneau began its operations. Tripp never intended to do anything under the notice unless (1) his plan had been approved, and (2) he was furnished with money to carry it out.

3. On his leaving the employment of Underwood August 3, he never advised the parties succeeding him of what he had done, nor discussed his plans with them. He retained in his personal custody the only extant copy of the notice until after trouble started between the two companies, and carried away with him his "intentions."

4. Tripp never had any intention of taking the water out on the north side of the creek. His intention was to preserve the *old* flume and utilize it in the later operations.

The record further shows that on April 4, 1912, he sold his so-called water rights to H. W. Hoops (Rec.,

Vol. VI, p. 2262). Hoops sold them to Sidney J. Jennings, March 10, 1913 (Rec., Vol. VI, p. 2267), and not until months after this action was commenced, and on May 21, 1914, did the Ebner Company acquire them from Jennings (Rec., 2271).

The record fails to show that either Hoops or Jennings had anything whatever to do with the Ebner *Company* as a corporation.

When Bent arrived on the ground in July, 1910, he had on his staff Mackay, his superintendent, Wettrick and Hill, his surveyors. Bent was not called as a witness. None of the other men testified to knowing anything about the Tripp notice, or having discussed Tripp's plans with them. Tripp seems to have been summarily discharged, and says he never discussed these matters with his successors. If there is any inference to be indulged in from the manner of his discharge, it is that his administration was not approved by his superiors.

All the movements of Bent, Mackay, Wettrick and Hill looking to the selection of a site to locate a mill indicate an independent investigation as to the merits of different sites, decision not having been reached until August 6, 1910 (Testimony of Mackay, Vol. II, p. 721).

There is another significant circumstance supporting the suggestion that neither the Ebner Company nor Tripp himself ever set up any claims under the so-called appropriation of water by Tripp. On Au-

gust 25, 1910, the Ebner Company commenced a suit against the Alaska Juneau, complaining of the trespass committed by that company by reason of the interference with the waters of Gold Creek flowing through the Ebner property (Rec., Vol. V, p. 1963). On the same day a similar suit was commenced by Tripp (Rec., Vol. VI, p. 2155). In neither suit is there set up any claim to the waters of Gold Creek, either through the Tripp notice or otherwise, other than as riparian owners. Upon this uncontradicted state of facts the trial Court applied the "doctrine of relation" to the Tripp water notice and the Tripp "intentions."

THE TRIPP WATER NOTICE AND ITS VALUE AS A MUNIMENT OF TITLE.

The notice posted by Tripp on June 20, 1910, was in the words following:

"LOCATION OF WATER.

"Notice is hereby given to all whom it may concern that I, the undersigned, claim 10 thousand miners inches of the water flowing in this creek or any part of 10 thousand miners inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek on the southerly side or to cross the Creek with pipe or flume or both to any place on the property known as the Ebner Mine, or to carry across or farther than the limits of said mine property. This location is made on the

ground this day and is posted at the place known as the Ebner Dam about 1¾ miles up from Juneau, Alaska, on Gold Creek.

"Dated this 20th day of June, 1910.

"Locator H. T. TRIPP."

It will be borne in mind that this notice was posted at the old Ebner Dam, at the intake of the old flume,

Testimony of Tripp, Vol. II, p. 555,

the grade of which Tripp had the expectation of using to generate power at the mill when the old air compressor was then installed above the Alaska Juneau damsite (Rec., p. 523).

As heretofore noted, this notice was not recorded until October 25, 1910. There was nothing whatever in this notice to indicate that the water was to be taken out of the creek at any point above the Alaska Juneau Dam. If the paper was constructive notice of anything, it was notice that no change in either the plan or manner of use was intended. The 15-stamp mill and the new mill building containing the old air compressor was on the Lotta patented claim of the Ebner. At that time the Ebner Company owned nothing below the Lotta claim. "The Ebner Mine," as then known, consisted of the group of patented claims shown on the diagram attached to the decree (Vol. V, p. 2681), commencing with the Lotta and extending northward as far as the Jewel.

Parish Lode No. 2, south of and adjoining the Lotta, was held by the District Court of Alaska in litigation between the same parties to have been a void location, and the area covered by it to have been Government land at the time the Alaska Juneau built its dam, which is on ground covered by the Parish No. 2 claim.

Findings in *Ebner Co.* v. *Alaska Juneau Co.*, Vol. I, p. 124;
Conclusions of Law, p. 127;
Decree, p. 128;
Mandate from this Court, p. 128;
See opinion of this Court, 210 Fed., 599.

The Auk Chief Lode was located by Thos. J. McCully in August, 1900 (Rec., Vol. VII, p. 2257). The Taku Queen by the same party, June 27, 1901 (p. 2259). These were conveyed to Tripp December 13, 1909 (p. 2260), by Tripp to Hoops April 4, 1912 (p. 2263), by Hoops to Jennings, March 10, 1913 (p. 2267), and by Jennings to Ebner Company after this suit was commenced—May 21, 1914.

The Cape Horn Lode Claim was not acquired by the Ebner Company until August 3, 1914 (p. 2225). The Cape Horn No. 2 was conveyed by Ebner January 31, 1913 (p. 2282).

Ebner parted with all his interest in the Ebner Company in March, 1908 (Rec., p. 1087), and never operated the property since (p. 1088). He still owned these claims in 1909 (see Letter Tripp to Ebner, Rec.,

p., 2164). None of these claims were ever worked as mines, they were in no sense a part of the "Ebner Mine," giving to the water notice the most liberal construction. Even when work was started on the new Ebner tunnel in 1911, water was still being used through the old flume to operate the old compressor above the Alaska Juneau damsite (p. 705). Even if the Tripp notice is to be considered constructive notice of anything, it certainly imparted no notice that it was the intention of the appropriator to take the water out of the creek and carry it around on the opposite side, presenting a location of the water *below* the point where it was turned back into the stream, after operating the old air compressor on the Lotta claim.

And yet the trial Court held that the mere posting of this notice without recordation was constructive notice of a claim by Tripp to take the water out on the opposite side of the creek, and turn it back below the Alaska Juneau millsite, or below the point where for years it had been turned back after having been used at the old air compressor above the present site of the Alaska Juneau dam.

If under any circumstances the posting of a notice without recording prior to intervening right is to be considered as imparting constructive notice to all the world, it must be that the notice posted must be so clear in its terms as to place and manner of diversion, nature and place of use, as to leave no room

for doubt as to what was intended. The intention must have been immediately present, a definite object must have been in view, and no uncertainties as to place or manner of use if later comers on the same stream are to be affected by it. As we have already pointed out, Tripp, a mere employee of some one other than the Ebner Company, and not shown to be in a legal sense in privity with that company, posts a notice of water appropriation which might be utilized at three different places, at least one of which (the Lotta claim) would not have affected the Alaska Juneau, and then waits for subsequent developments and investigations to determine which of the three projected plans will materialize, Tripp's situation was in itself speculative. The mines would only be worked if they proved valuable, and actual use of the water at any place was dependent on the outcome of a speculative enterprise.

His intentions were analogous to the case where a locator testified:

> "My intention was that knowing that a good location was wanted for a smelter site, to hold it for that purpose."
>
> *Miles* v. *Butte Electric & Power Co.* (Mont.), 79 Pac., 549, 554.

As was said by the Supreme Court of California:

> "Until a claimant is himself in position to use the water, the right to water or water rights does

not exist in such sense that the mere diversion and use of the water by another is ground of action to recover the water or for damages for diversion."

Nevada County and Sac. Canal Co. v. *Kidd,* 37 Cal., 282, 311.

See also

Kimball v. *Gearhart,* 12 Cal., 27.

"A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same."

Columbia Mining Co. v. *Holter,* 1 Mont., 296, 300.

And as we have heretofore said, Tripp had nothing to do with the Ebner Company, and the Ebner Company had nothing to do with Tripp.

The court found that there were no written rules adopted by the miners, or if they had been, they had fallen into disuse. (Finding X, Record, Vol. VII, p. 2670), and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and that they are inconsistent with the laws of the United States, and could not be in force since the extension of organized government to Alaska in the year 1884. The court finds, however, that there was a custom among the miners to post a notice, and that notice (without recordation) operated as con-

structive notice to all the world, and that Tripp knew of this custom and was governed by it.

Finding IV, Record, Vol. VII, p. 2647.

This leads us to a discussion of the laws in effect in Alaska governing appropriations of water, the extent to which the water is subject to regulation by miner's rules, and what rules, if any, had been adopted and were in force in June, 1910, and thenceforward.

WATER RIGHTS IN ALASKA—MINER'S RULES AND CUSTOMS.

There are no statutory provisions in Alaska prescribing the manner in which water may be appropriated.

Section 16 of the Act of making further provision for the Civil Government of Alaska, June 6, 1900 (31 Stats., 328) appears as Section 175 of the Compiled Laws of Alaska, p. 157.

It provides that

> "Miners in any organized mining district may make rules and regulations governing the recording of notices of locations of . . . water rights, flumes and ditches . . .; and all records heretofore made in good faith in any regularly organized mining district are hereby made public records and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act."

Section 379, subdivision seventh, of the compiled laws of Alaska, p. 258, requires that the respective

recorders of the various recording districts shall record notices and declarations of water rights.

At the time the act of June 6, 1900, *supra,* was passed, the Harris Mining District was an organized mining district, with specifically defined boundaries. The property here in controversy is situated within that district.

Water appropriations for mining purposes in Alaska are subject to regulation by rules of miners.

4 *Kinney on Irrigation,* Sec. 1708;
1 *Weil on Water Rights,* 3rd Ed., p. 388, note.

The question arises in this case, although, as we view it, not a vitally essential one, as to whether at the time the Tripp notice was posted there was any miners' rule or custom in force on the subject of appropriation.

It appeared in the evidence that as far back as 1882 a set of Miners' Rules governing water rights was adopted by the miners of Harris Mining District.

Record, Vol. V, p. 1973-6.

They were printed by lawyers in Juneau, and circulated in pamphlet form (page 1977 and page 1988).

These rules are shown to have formed a part of the records of the Harris Mining District, being produced by the then U. S. Commissioner for the Juneau Recording District, being in his possession as such official.

Testimony of Marshall, Vol. III, p. 872-876.

John G. Heid was the last District Recorder, and as the miners had elected the U. S. Commissioner as District Recorder to avoid confusion, Heid, pursuant to instructions at a miners' meeting, turned over these records to the Commissioner.

Testimony of Heid, Vol. IV, p. 1467, *et seq.*

These rules contain among others the following requirements:

1. The posting of a notice at the point of intended diversion, specifying the extent claimed in (miner's) inches, measured under a four inch pressure, the purpose for which he claims it, and the place of intended use.
2. A copy as posted must be recorded in ten days.
3. Within twenty days during the working season after notice is posted, work must be commenced.
4. A failure to comply with these rules deprives the claimant of his right to the use of the water.

Record, p. 1984, Vol. V.

The Tripp notice did not comply with these rules. The notice was posted June 20, 1910, and not recorded until October 25th, 1910. No work was done by Tripp at all, and none by those who followed him, until after the Alaska Juneau had commenced work.

A great deal of oral testimony was introduced by both parties on the subject of these rules, the Ebner Company contending that they had fallen into dis-

use, and the Alaska Juneau asserting that they were continuously observed and in force.

The most satisfactory and convincing evidence on this subject was the records themselves, or a condensed table taken from the records, showing what the almost universal custom was, at least as to the contents of the notice and its recordation. These tables, introduced by plaintiff, appear commencing at page 2045, Vol. V. The key to this tabulation is found in Vol. V, p. 2044, and is as follows:

> The letter A indicates that the notice designates the place of use.
> The letter X, no place of use specified.
> The letter B, where time between location and recording is ten days or less.
> The letter O, where time between location and recording is more than ten days.

The period covered by the investigation commences June 27, 1881, and ends March 23, 1914. Tabulation of results by years is shown on p. 2092, Vol. VI. The total number of locations shown to have been made during this period was three hundred and eighty-six. Of these two hundred and ninety-three, or seventy-five per cent., were recorded within ten days. Twenty per cent. were recorded after ten days from the date of the notice. Fourteen notices, or three per cent., had no date. Eighty per cent. designated the place of intended use. Nineteen per cent. failed to so designate.

Tables introduced by defendant showed four hundred and fifty-six locations, two hundred and seventy-

four of which were recorded within ten days from date of notice, and thirty-five within ten days from the date of posting, as shown in the notice, making a total of three hundred and nine. Ninety-five were recorded after ten days, computing from date of notice. Thirty-four were not recorded within ten days from date of posting shown in the notice. Eighteen were indeterminable.

Defendant's Tabulation, Vol. VI, p. 2381.

The witness, L. E. Van Winkle, who examined the records and testified for the Ebner Company and made the tabulation, was shown upon cross-examination to have been unfamiliar with the boundaries of the District and to have included in his estimate a substantial number of locations that were obviously improperly included in his estimate.

See

Cross-examination of Van Winkle, Vol. V, p. 1831, *et seq.*

Taking either tabulation, it is evident that by far the larger proportion of all notices of appropriation were recorded within ten days, and to this extent at least the custom is established; in other words, the written miners' rules in this behalf have been followed.

Rules and regulations were proved to have been adopted and acquiesced in; a presumption arises that they continue in force until something appears show-

ing that they have been repealed or have fallen into disuse and another practice has been generally adopted and acquiesced in.

North Monday v. *Orient,* 1 Fed., 522;
Jupiter M. Co. v. *Bodie Cons.,* 11 Fed., 666;
Riborado v. *Quang Pang,* 2 Idaho, 131, 6 Pac., 125.

The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused.

North Monday v. *Orient M. Co.,* 1 Fed., 522.

If the rule requiring recording within ten days, as prescribed by the written rules, was in force and generally recognized, it should logically follow that the penalty for failure to so comply in the presence of a subsequent locator was also in force. Otherwise why should seventy-five per cent. of water appropriators obey the rules and record within the ten days?

The Tripp notice has this further defect. It fails to specify with reasonable certainty the place of intended use.

If we are to assume that there was no local rule or custom on the subject, then the one who first commences work secures the prior right, and in this case it was the Alaska Juneau.

In the case of *Van Dyke* v. *Midnight Sun,* 177 Fed., 85, 92, this court said:

> "Inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of water upon the public land, we think no such notice essential to the validity of a *bona fide* diversion of such waters for a beneficial use in Alaska."

If this be true and a correct statement of the law applicable to this case, how is it possible to impart to the Tripp posting, *constructive notice?*

The finding of the court on the question of custom is limited to the posting of the notice and the legal attribute of imparting *constructive* notice to all the world. How is it possible for this legal quality to attach to a posted notice by a *custom,* no proof of which is possible? Constructive notice is always a creature of the statute, not of a local custom. If there was no duty or obligation incumbent on Tripp to post the notice, the notice when posted could not operate constructively, unless followed up with development in advance of intervening rights.

The notice itself was torn down in July. It is not suggested that the Alaska Juneau had anything to do with this. It is not contended that the Alaska Juneau ever saw it or knew of the existence of the notice.

If by process of common factoring we eliminate all the water notices of both sides in this case, as not

being required or authorized by law or local custom in Alaska, we come inevitably to the rule announced by Judge Wolverton as being the rule recognized by this court:

> "In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but applying the doctrine of relation, fixes it as of the time when he began his dam or ditch or flume or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence.
>
> *Amalgamated Sugar Company* v. *Hempe* (on rehearing), 226 Fed., 1019.

Tested by this rule, the Alaska Juneau is prior in point of time. It commenced its work on August 1, 1910, and continued incessantly until the diversion was completed.

THE MULLIGAN NOTICE AND RIGHTS OF ALASKA JUNEAU ARISING THEREFROM.

On August 1, 1910, Kinzie, Superintendent of the Alaska Juneau, sent Mulligan to Gold Creek to post a notice of water appropriation in behalf of the Alaska Juneau Gold Mining Company (Record, Vol. I, p. 182). Such a notice was posted by Mulligan (Vol. I, p. 443). This notice was as follows:

> "Know all men by these presents: That I, L. D. Mulligan, of Alaska, a citizen of the United States

and over the age of twenty-one years, have appropriated and claimed 20,000 miners' inches of waters of Gold Creek, near Juneau, Alaska, to be used for milling, mining and other purposes.

"Said water to be diverted from said creek at a point indicated by this notice posted on a tree and about one mile from the mouth of said Gold Creek. Said water is to be diverted by ditch, pipe and flume.

"L. D. MULLIGAN.

"Dated, Aug. 1, 1910."

Plaintiff's Exhibit 24, Vol. V, p. 1959.

This notice was recorded August 8, 1910 (p. 1960). On August 2, 1910, Mulligan executed to the Alaska Juneau an assignment of this water right (p. 1960).

This notice was posted at a point a short distance north, 150 feet, of where the Alaska Juneau Dam was subsequently constructed. This point was determined by the District Court of Alaska in litigation between these parties to be on the patented Lotta Claim belonging to the Ebner Company.

There was prior to this determination a great deal of uncertainty as to where the South side line of the Lotta was. The numerous positions which the boundaries of this claim might occupy, applying the different methods, is shown on Defendant's Exhibit B, Vol. VI, p. 2161. If the patent tie calls were given effect, the notice would not have been on the Lotta claim. The same result would have followed if the position of Gold Creek was correctly shown on the official plat accompanying the patent (Defendant's Ex-

hibit T, Vol. VI, Record, p. 2168, p. 2169). The Ebner Company succeeded in establishing the lower side line in the litigation referred to, by establishing the position of the stakes as they were set on the ground. Such stakes as so claimed could not be harmonized with the tie calls, the patent plat or calls for course and distance. It is not proposed to here retry that issue. The most that can be made of it is that a mistake was made owing to the confusion and uncertainty at the time the notice was posted, and that through an inadvertence the precise place where the notice was posted turned out to be on the Lotta patented claim. This, however, is, we think, quite immaterial. No claim of right was asserted to the land on which the notice was posted. The line of the flume and the dam as subsequently constructed was not on any property to which the Ebner Company had any right. The object to be obtained was the water flowing in Gold Creek, at a point below where it was then being turned back into the creek by the Ebner Company. The Ebner Company had no riparian right to the water arising out of its ownership of the Lotta claim.

Van Dyke v. *Midnight Sun M. & D. Co.*, 177 Fed., 85;

See also

State v. *Superior Court* (Wash.), 126 Pac., 945, 955.

It will also be borne in mind that the Alaska Juneau commenced active operations on the same day the notice was posted, and thereafter prosecuted its work incessantly, until actual diversion was made. This was of itself sufficient initiation of the right in the absence of any valid prior appropriation. If the Tripp notice possesses no legal value, as we earnestly contend that it does not, there can be no serious question of the priority of the right of the Alaska Juneau.

There were other supplemental and amendatory notices posted and recorded by the respective parties, but as both parties had prior to this time commenced and were actually engaged in prosecuting work, these notices are of no substantial significance.

ERRORS COMPLAINED OF AND ASSIGNED.

With the foregoing presentation of the case and its background, we may take up for consideration the errors relied upon which attack the findings and conclusions of law.

These findings, and the objections to them, appear in Vol. VII of the Record, commencing at page 2642. Findings I and II were not objected to. The others will be considered in order.

FINDING III.

This Finding is as follows:

> "That sometime about 1908, and a long time prior to the commencement of this action, the

Ebner Gold Mining Company and its general manager and president, William M. Ebner, concluded to open up the said mining property and mine, mill and treat the ores taken therefrom upon a larger scale than it had theretofore been operating said mines, and to that end and purpose it was concluded to drive a large working tunnel, commencing said tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company, thence driving said tunnel through said group of claims to the upper end of the same to the old workings, which said tunnel would crosscut the formation and show up the values of the property, as well as to serve as a working tunnel. They also concluded upon building and constructing and equipping a large stamp-mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a flume and pipe-line to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the place where it was decided to erect the 150 or 200-stamp mill, and to erect such other buildings and install such other machinery so as to carry out the plans decided upon.

"That during the year of 1909 one H. T. Tripp, an experienced mining engineer, was employed by persons interested in said group of mining claims of the Ebner Gold Mining Company to look over, examine and explore said mining property and to report on the advisability of opening up and mining said property on a larger scale, as had been decided on by the said William M. Ebner, and the said Ebner Gold Mining Company.

> That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing there through, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or the first of July, 1910."

This finding is attacked by Assignments of Error Nos. 40, 41, 42 and 43. The exceptions taken to it appear in Vol. IV of the Record, p. 2645.

All of the facts in this finding are wholly irrelevant and immaterial. The vital question in this case is not what the antecedent intentions of either Ebner or the Ebner Company were, as to the future plans for operating the property in 1908. In March of that year Ebner parted with all his interests in the property of the Ebner Company (Rec., Vol. III, p. 1087), and never had anything to do with the property since (p. 1088). Cape Horn Lode Claim No. 2, on which the proposed tunnel was to be built, was not then owned by the Ebner Company. It succeeded to the title on January 31, 1913 (Rec., Vol. VI, p. 2282). Nothing was ever done to disclose the so-called "intention" of Ebner or the Ebner Company. The only move ever made was by Tripp in June, 1910, when he posted the Tripp notice. He is not shown to have known anything about the "intentions" of the Ebner Company. It is positively shown that Tripp had nothing whatever to do with the

Ebner Company. He was employed by a man by the name of Underwood, who was said to be president of the California Nevada Copper Company (Rec., Vol. II, p. 510, *et seq.*).

We have heretofore epitomized Tripp's testimony (see page 32 of this brief), from which it clearly appears that Tripp was acting for somebody who had some vague sort of option on the Ebner stock. Tripp owed no duty to the Ebner. His acts and conduct were in no sense binding on that company. He was not its agent in any sense. The attempt made by this finding is to attach to Tripp's activities the antecedent two-year-old intention of the Ebner to do certain things. He is said by the finding to have been "employed by persons interested in said group of "mining claims of the Ebner Company to look over "and examine and explore said mining property and "to report, etc."

The finding that Tripp was employed by "persons interested" in the Ebner property is not a finding that he was employed by the Ebner Company. A bondholder, a stockholder, a lienholder, or the holder of an option on the stock of a company may be *interested* in the property, but what he does in no sense is attributable to or binding upon the company.

Tripp did not report to the Ebner Company. He reported to Underwood, not what the Ebner Company's "intentions" were, but what he, Tripp, thought was the best thing to do (Rec., Vol. II, p.

513; also ps 31-33 of this brief). The process of reasoning by which the Court arrived at this finding must have been about as follows:

In 1908 the Ebner Company had certain ideas how the property should be worked and when a mill should be built. Tripp in 1910 recommended these plans as one of three separate alternative suggestions. Therefore, Tripp's actions must have enured to the benefit of the Ebner Company.

In addition to this the record shows that the Ebner Company had previously erected a mill building on the Lotta claim, in which later an air compressor was installed and excavation made for enlargement of the mill plant. This is the only physical act ever done by the Ebner Company evidencing an intention to erect a mill anywhere.

The finding is not the finding of an ultimate fact. There is no possible legal deduction which can be drawn from it, which is of any legal value whatever.

FINDING IV.

Finding IV is as follows:

> "The Court further finds that as early as October, 1880, the miners in and near the vicinity of Juneau and Silver Bow Basin, including the territory covered by the Ebner Company's group of mining claims, diverted and appropriated water from streams to be used for mining and other beneficial purposes and ever since about that date it has been the universal practice and general cus-

tom for any person or corporation desiring to appropriate water for the purposes last above mentioned to post a notice in writing in a conspicuous place at the intended point of diversion on the creek or stream from which the water is expected to be diverted or taken; that the posting of such notice has always been considered under such general custom of miners as the first step taken looking towards the appropriation and applying the water to mining or some other beneficial use as well as showing the intention of the person or corporation posting the notice and giving warning and notice to others of the poster's intention of utilizing such water.

"And the Court further finds that the posting of the notice in the manner above mentioned does serve the purpose above stated. That the said H. T. Tripp knew of the above-mentioned custom, and while examining and exploring the group of mining claims of the said Ebner Gold Mining Company as stated in these Findings, on the 20th day of June, 1910, attached to a board and posted in a conspicuous place on the Ebner Gold Mining Company's dam, which had been constructed for the purpose of diverting the water and conducting it to the 15-stamp mill, a written notice claiming 10,000 miner's inches of water of the said Gold Creek, which said notice is as follows:

"'NOTICE OF WATER.

"'Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miner's inches of the water flowing in this creek or any part of 10 thousand miner's inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek with pipe or flume or both to any

place on the property known as the Ebner Mine or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner dam about 1¾ miles up from Juneau, Alaska, on Gold Creek.

" 'Dated this 20th day of June, 1910.
" 'Time—7:30 A. M.

" 'Locator—H. T. TRIPP.
" 'Witness: JOHN SOINI.'

"That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted. That while said H. T. Tripp signed or affixed his own name to the notice, the said making out of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes, was done by the said Tripp on behalf of and for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein, and said water was intended to be conducted down, over and across the said group of mining claims from the point of intake of the said defendant company to the millsite and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property, and there to be used and applied to the air-compressor and the new mill to be built, and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as had been referred to in these Findings."

This finding is attached by Assignment of Error No. 5. The exceptions taken to it appear in Vol. IV of the Record, p. 2649. What we understand to be the rule governing water appropriations for mining purposes in Alaska is set forth in the subdivision of this brief under the head of "Water Rights in Alaska —Miners' Rules and Customs," ante, p. 41. We have also discussed under the heading "The Water Appropriation by H. T. Tripp and his relation to the Ebner Company," ante, p. 28, Tripp's relation or lack of relation to the Ebner Company, under the heading, "The Tripp Water Notice and its value as a muniment of title," ante, p. 35.

It is unnecessary to here repeat what is there said. We may, however, summarize views discussed under these headings:

1. The testimony shows that the written rules, so far at least as the posting and recording of notices were concerned, were in force. That these rules required notices to be reasonably certain as to their contents, and the Tripp notice had no force as imparting notice constructively, as it was not recorded and was too indefinite as to the place of intended use and method of diversion.

2. Whatever intentions Tripp had in posting the notice were purely personal to him, and had no connection with the Ebner Company.

3. The notice was purely speculative. Tripp's plans involved three alternative places where the water might be used. The notice was purely tentative; the selection of the ultimate place was to be determined by others. Work under the notice was not to be prosecuted unless he was furnished with funds, which never materialized. He was discharged by his employer, and never discussed the matter with those who succeeded him.

4. It is not shown that whatever was done by Tripp's successors was done with a knowledge of Tripp's intentions, or the adoption of such intentions. The place where the mill was to be constructed was not settled until August 6th, and it was then settled after an independent investigation by Bent, Mackey and the surveyors.

5. The record fails to show that any of the parties from Tripp down were ever in any way in such privity with the Ebner Company as would bind that company in anything they did.

6. The record fails to show that the Ebner ever acquired any possible claim of right under the Tripp notice until long after this suit was brought. The record shows no transfer from Tripp to even his own employer, the California Nevada Copper Company, and no relationship

whatever, contractual or otherwise, is shown to exist between that Company and the Ebner Company.

There is a certain part of this finding to which we may call this Court's attention. The finding says (italics are ours):

> "That while said H. T. Tripp signed or affixed his own name to the notice, the said making of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes was done by said Tripp *on behalf of or for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein.* . . ."

We submit that this is not a finding that the Ebner Company did the acts recited. It negatives any such deduction. The Ebner Company had nothing to do with it. One seeking to appropriate water must have a present *intention* and ability to devote it to a specific use at a specific place, not a contingent intention, which others might or might not entertain.

A water notice posted by a party who does not know which of three possible places is to be selected for ultimate use, cannot acquire a right as against intervening appropriators. Such a notice would be speculative in its nature, and should not be given the effect of compelling subsequent appropriators to wait until the first appropriator finds out where he

will conduct the water. We desire further to call the special attention of the Court that the notice set up in the finding is not a copy of the notice posted by Tripp. The original notice states that the water is to be conveyed along the bank of the creek "on the southerly side." The phrase "on the southerly side" was omitted by the Court.

FINDING V.

Finding V is as follows:

> "The Court further finds that the action of said Tripp in posting of said notice mentioned in the finding above set forth was the first step taken by anyone looking towards the future diversion and appropriation of the water of Gold Creek, and said action of said Tripp was prior to any step taken by plaintiff, or any intention made manifest by plaintiff, of taking any water from Gold Creek and applying it to mining or other beneficial use, and was prior to the posting of any water location notice by said plaintiff.
>
> "That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek."

This Finding is attacked by Assignments of Error Nos. 51, 52, 53.

The exceptions taken to it appear on pages 2655-2659, Vol. VII, of the Record.

V.

This finding is based upon the assumption that there was some legal value to be attached to the Tripp notice, and that the Ebner Company succeeded to Tripp's rights whatever they might be. We think we have clearly demonstrated first that the notice possessed no legal value, and did not operate as constructive notice of anything; that it was purely speculative. We have also shown that the Ebner never acquired any rights such as they may be under the Tripp notice until long after the suit was brought.

The latter part of the finding suggests indirectly, and inferentially, that the Ebner Company did something to give the Tripp notice vitality.

As a matter of fact there is not a line of testimony in the record, written or oral, which shows that the Ebner Company ever did a stroke of work or expended a dollar of money in any activity whatever in connection with the so-called Tripp water location. All the acts done and money spent were done and spent by parties who are not shown to have any such relation to the Ebner Company as to even lead to the inference that the Ebner Company was in any way bound by such acts.

This finding is clearly contrary to the evidence, and is replete with erroneous and illogical inferences.

That part of the finding which decides

> "That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted, *and after* actual diversion of the water at such point, did plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek,"

is deserving of special notice.

1. The defendant did *not* post any notice, nor was any posted in its behalf.

2. Defendant did no work whatever.

3. Plaintiff caused the Mulligan notice to be posted on August 1, 1910, and on the same day commenced work *under the notice* and continued until it diverted and used the water. The diversion, so-called, said by the Court to have been made by defendant, but in fact made by the California & Nevada Copper Company, consisted of hurriedly putting in one or two sections of flume at the intake, about Oct. 4 or 5, 1910, and running water through it and turning it back into the creek within a few feet of the dam. No beneficial use of the water was ever made by anybody, *even after the flume line was completed until more than two years* had elapsed, when the new com-

> pressor was taken out of storage at Juneau by the California & Nevada Copper Company and installed at Shady Bend.

On August 25, 1910, the Ebner Company commenced suit against the Alaska Juneau sounding in trespass, alleging the very acts and things done by the Alaska Juneau looking to the appropriation of the water, and in the complaint in that action the Ebner Company set up that the Alaska Juneau had ever since July 27, 1910, been engaged in removing timber and clearing up what appears to be a right of way for a flume, ditch or pipe line to convey the waters of Gold Creek, and that if these acts were continued the Alaska Juneau would divert the water of Gold Creek from the Ebner Company.

> Plaintiff's Exhibit 26, Complaint of Ebner Company, Record, Vol. V, p. 1963, paragraph VI, p. 1966.

If on August 25, 1910, the Ebner Company could make the acts done by the Alaska Juneau, for the purpose of diverting the water, the ground of a complaint in equity to enjoin the continuance of the acts complained of, the Ebner Company ought not now to be permitted to dispute the facts as alleged by it in the former action.

FINDING VII.

Finding VII is as follows:

"That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company.

"That work was commenced under said Tripp notice and those for whom said water was located and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use. The tunnel mentioned in these findings which had been decided upon to be driven by said Tripp and Ebner was soon after the filing of said notice surveyed out, commencing at the lower end of the said group of claims on Cape Horn No. 2 lode claim, and extending to the upper end of said group of claims to what is known as the old Ebner workings, about the point of the 15-stamp mill, and had been driven at the time of the commencement of this action 2600 feet and taps the ore bodies of said group of claims at various depth, being from the bottom of said tunnel to the surface about —— feet. That a right of way was surveyed out for a high line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hillside across the Ebner property to a point near the portal of the tunnel and the millsite, which said flume is 3¾ feet by 4 feet and about 4000 feet long, and has a carrying capacity of approximately 3200 miner's inches of water, and had been completed

at the time of the commencement of this action. Lumber and material were purchased for a 200-stamp mill, and most of the machinery bought to equip said mill, the millsite graded at or near the portal of said tunnel, and at or near the point where the water was to be conveyed. That on the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Tripp notice was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion of the water from Gold Creek was prior to any diversion therefrom made by the plaintiff herein. The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said Company on the 15th day of December, 1910. Work was commenced on the tunnel above referred to on or about the —— day of ————, 1910, and was diligently and actively kept up, said tunnel being 8 feet by 8 feet, and as above stated had been driven 2600 feet at the time of the commencement of this action, and at the time of filing the answer in this cause there had been over 4000 feet of tunneling, cross-cuts and drifts completed. That before the commencement of this action a large new air-compressor plant had been erected near the mouth of the tunnel and a pipe-line leading from the penstock above mentioned to the air-compressor, and in August, 1913, said pipe-line was connected up with said air-compressor and the water used for power in running the same, and said air-compressor was used in continuing the driving of the new tunnel referred to in *these* finding and has been applied to that use ever since said last mentioned date. Prior to the commencement of this action the lumber and material referred to herein for the building of the 200-stamp mill as well as the machinery for the equipment of the

said mill had been purchased and forwarded to Juneau, Alaska, and most of the same on the millsite near the place of the erection of the new mill. That since the commencement of this action and at the time of the trial of the same, work has progressed on said property with due diligence and from time to time larger quantities of water taken from Gold Creek through the said new flume and applied to use by the defendant company as necessity demanded."

This finding is attacked by Assignments of Error Nos. 54, 55, 56, 57, 58, 59, 60, 61 and 62. The exceptions taken to it appear on pages 2662-2667, Vol. VII of the Record.

The first part of the finding challenges special attention.

"That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company."

This is directly contrary to the facts. The record shows the following transfers by Tripp:

April 4, 1912. Tripp conveyed to Hoops. Record, Vol. VI, p. 2263.

March 10, 1913. Hoops conveyed to Jennings. Record, Vol. VI, p. 2267.

May 21, 1914. Jennings conveyed to the Ebner Company. Record, Vol. VI. p. 2271.

Neither Tripp, Hoops or Jennings are shown to have had any antecedent connection with the work done looking towards a diversion of the water, and it was not until long after the suit was commenced that the Ebner ever connected itself in any way with the Tripp notice.

It will be recalled that Tripp testified he had nothing to do with the Ebner Company (Rec., Vol. II, p. 538); that he never recorded the notice (Vol. II, p. 521); that the notice was torn down in July, 1910 (Vol. II, p. 580); that no work was done under the notice (Vol. II, p. 562); that on August 3, 1910, he was ordered to get off of the ground (Vol. II, p. 540); that he never informed those who succeeded him of the fact that he had made a water location (Vol. II, p. 514), and that he held the title to whatever rights were conferred by the notice until April 4, 1912, when long after there has been a complete diversion of the water by the defendant, he transfers his title to Hoops, a party not shown to have any connection with the Ebner Company, shows to our mind quite clearly that the Court below was not justified in making this finding.

It hardly requires the citation of authorities to show that a water right is an incorporeal hereditament, in fact is real property and must be conveyed by deed. We append a few cases, however.

Rickey Land & Cattle Co. v. *Miller & Lux,* 152 Fed., 11;

Travelers' Ins. Co. v. *Childs,* 54 Pac. (Colo.), 1020;

Kinney on Irrigation and Water Rights, 2nd Ed., §769;

First National Bank v. *Hastings,* 42 Pac. (Colo.), 691;

Monte Vista Canal Co. v. *Ditch Co.,* 123 Pac. (Colo.), 831;

Smith v. *Denniff,* 60 Pac. (Mont.), 398.

Contracts in relation to water rights are within the statute of frauds.

Hayes v. *Fine,* 91 Cal., 391, and cases cited.

If the Ebner Company claimed anything under Tripp at the time the suit was commenced, it was required to show by at least some evidence,—a contract, or trust relationship. Not only is no such thing even hinted at in the testimony, but it is affirmatively shown that Tripp had nothing to do with the Ebner Company. Nor did his employer, the California Nevada Copper Company.

As to the remainder of the finding, it is all predicated on some value being attributed to Tripp's notice and to the acts done by the California Nevada Copper Company. Whatever was done, it was not done by or for the Ebner Company.

The construction of the new Ebner flume carried the water down to a proposed millsite, *and for a period of over two years was not used for any pur-*

pose whatever. Power to run the tunnel was during this time obtained from the old air compressor on the Lotta Claim, and the rights of the Alaska Juneau were not interfered with. The lumber for the 200-stamp mill was ordered in July, 1910, before any site was selected. It was not ordered for any particular millsite. When any of it was moved on to the mill-site is not shown. Some of it was on the site at the time of the trial (in June, 1914), but from 1910 until that date no use was ever made of it.

In this finding the Court finds that the capacity of the new Ebner flume is 3200 inches, and yet the decree awards 10,000 inches, the amount named in the Tripp notice.

None of the activities set forth in this finding were done by the Ebner Company. When a party goes into possession of property under an option, and makes excavations and builds structures, these may enure by gravity to the benefit of the property. But this does not commit or bind the owner of the property to any of the plans or intentions of the optionee.

FINDING IX.

Finding IX is as follows:

> "That the tunnel being driven by the defendant, the Ebner Gold Mining Company, referred to in these findings, is being driven through the group of Ebner lode mining claims, known as the Ebner mine, being the group of lode mining claims for the benefit of which said water was located by

said Tripp, as aforesaid, and all of the work in connection with the development and opening up of the ore bodies in said group of claims since the location of said water by said Tripp has been done with diligence, and $351,000.00, more or less, expended in opening up such ore bodies in said Ebner group of lode mining claims, and the work was at the time of the trial still progressing with diligence. That all of said work was being done for the purpose of opening up the Ebner group of lode mining claims as a mine so that the bodies of ore within the exterior boundary lines of said group of claims could be opened up and mined, and the ores milled and treated, and the precious metals extracted therefrom."

This Finding is attacked by Assignments of Error Nos. 63, 64 and 65. The exceptions taken to it appear in Vol. VII, pages 2668-2670.

The evidence shows that the tunnel is being run, not by the Ebner Company, but by the United States Mining Company, under some sort of an option from the "Chapman Committee." All the expenditures made were by the United States Mining Company under some kind of an option, the nature of which is not disclosed. It would seem that the Ebner property has been foreclosed and sold, it has ceased to have any interest therein, and the "Chapman Committee" were then in the saddle—for what purpose is not disclosed (Testimony of Muir, Vol. III of the Record).

FINDING X.

Finding X is as follows:

> "With reference to the rules and regulations which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the Court finds, after careful consideration of the evidence and the law relating to such rules and regulations, that they never were followed by the miners and were never put in force, or, if they ever were followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and that they are inconsistent with the general laws of the United States and could not be in force since the extension of organized government to Alaska in the year 1884, and are therefore of no effect in the determination of the issues in this case."

This Finding is attacked by Assignments of Error Nos. 66, 67, 68, 69. The exceptions taken to it appear in Vol. VII, pages 2671-2673, of Vol. VII of the Record.

We have heretofore under the title "Water Rights in Alaska—Miners' Rules and Customs" (ante, p. 41), discussed the subject involved in this Finding.

We may add to what is there said a few suggestions. The finding is in the alternative. Either the rules were never adopted, or if they were, they had become obsolete, or if they were not obsolete, they were after

1884 in conflict with the general laws of the United States. Without commenting on the perplexity arising from this method of making a finding, we suggest in addition to what we have heretofore said on the subject of these rules, that the last alternative, i. e., conflict with Federal laws, is not the finding of an ultimate fact. It is simply a statement of a legal conclusion which is wholly unwarranted.

FINDING XI,

Finding XI is as follows:

> "The Court further finds that the work of diversion, appropriation and application of the water from Gold Creek by the defendants herein was prosecuted to completion with reasonable diligence from the time of the inception of said right."

This Finding is attacked by Assignment of Error No. 70. The exceptions taken to it appear in Vol. VII of the Record, pages 2673-2674.

The vice of this finding lies in the assumption that the Ebner Company ever did anything either by way of appropriation or diversion or use, subjects which we have fully discussed in all their lights and shadows.

CONCLUSIONS OF LAW.

The Conclusions of Law are three in number and are as follows:

I.

"That as against the plaintiff, the defendant is the owner of and entitled to the first use of 10,000 miner's inches of water, to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted."

II.

"That whatever rights plaintiff has in the water of Gold Creek by reason of anything set forth in its complaint, is subsequent, inferior and subordinate to the rights of the defendant, as set forth in these Findings."

III.

"That the plaintiff is not entitled to the relief asked for or to any relief."

These Conclusions of Law are attacked by Assignments of Error Nos. 71, 72 and 73. The exceptions to them are found on pages 2674-2676, Vol. VII of the Record.

The first Conclusion of Law is obviously error. The capacity of the new Ebner flume is admittedly only 3200 miner's inches (Finding VII). The Tripp notice and the Court's erroneous treatment of it is responsible for troubles enough without it being utilized

as a basis for awarding the Ebner Company 6800 miner's inches of water more than the new flume could possibly carry. This of itself is sufficient to require a reversal. But if our analysis of the facts shown by the record is correct, and we respectfully submit that it is, the deductions therefrom embodied in the Conclusions of Law are obviously erroneous.

We respectfully submit that the decree should be reversed with directions to the Court below to enter a decree in favor of the Alaska Juneau as prayed for in the complaint.

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